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CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Draft articles on the law of the non-navigational uses of international watercourses and resolution on confined transboundary groundwater

Report of the Secretary-General

Addendum

CONTENTS

	Page
II. COMMENTS AND OBSERVATIONS RECEIVED FROM STATES	5
C. Comments and observations relating to specific draft articles	5
PART I. INTRODUCTION	5
Article 1. Scope of the present articles	
Sudan	5
Article 2. Use of terms	
Sudan	5
Article 3. Watercourse agreements	
Sudan	5

96-28132 (E) 221096 231096 241096

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CONTENTS (continued)

Page

Article 4. Parties to watercourse agreements

Sudan 6

PART II. GENERAL PRINCIPLES 7

Article 5. Equitable and reasonable utilization and participation

Sudan 7

Article 6. Factors relevant to equitable and reasonable utilization

Sudan 7

Article 10. Relationship between different kinds of uses

Sudan 7

PART III. PLANNED MEASURES 8

Article 11. Information concerning planned measures

Sudan 8

Article 12. Notification concerning planned measures with possible adverse effects

Sudan 8

Article 13. Period for reply to notification

Sudan 9

Article 14. Obligations of the notifying State during the period for reply

Sudan 9

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT 9

Article 23. Protection and preservation of the marine environment

Sudan 9

CONTENTS (continued)

Page

Article 24. Management

Sudan 9

Article 25. Regulation

Sudan 10

Article 26. Installations

Sudan 10

PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS 10

Article 27. Prevention and mitigation of harmful conditions

Sudan 10

Article 28. Emergency situations

Sudan 10

PART VI. MISCELLANEOUS PROVISIONS 11

Article 29. International watercourses and installations in time of armed conflict

Sudan 11

Article 30. Indirect procedures

Sudan 11

Article 31. Date and information vital to national defence or security

Sudan 12

Article 32. Non-discrimination

Sudan 12

Article 33. Settlement of disputes

Sudan 12

CONTENTS (continued)

Page

RESOLUTION ON CONFINED TRANSBOUNDARY GROUNDWATER 12

Sudan 12

II. COMMENTS AND OBSERVATIONS RECEIVED FROM STATES

C. Comments and observations relating to specific draft articles

SUDAN

[Original: Arabic]

[9 October 1996]

PART I. INTRODUCTION

Article 1. Scope of the present articles

1. In addition to their application to the uses of the watercourse itself and the waters contained in it, it is important that the articles should apply to measures aimed at solving other watercourse problems, such as measures relating to maintenance, management, flood control, erosion and sedimentation.

2. The statement made in the commentary on article 1, paragraph 2, that navigation "requires that certain levels of water be maintained" raises an ambiguity that requires clarification. Although the use of an international waterway for navigational purposes is not one of the factors that are taken into account in defining equitable and reasonable utilization in accordance with draft article 6, this statement may nevertheless be used as a basis for preventing a particular State from obtaining its equitable and reasonable share on the grounds that navigation requires that certain levels of water be maintained.

Article 2. Use of terms

1. The inclusion of "groundwaters" in the definition of an international watercourse given in draft article 2 (b) would enable every State in which such groundwaters are located to claim that it is an international watercourse State and hence to claim a share of its waters. It is therefore possible that this text might create problems of a new kind, and we accordingly propose that the draft articles should deal only with surface waters. The International Law Association, which adopted the Helsinki Rules on the Uses of the Waters of International Rivers at its Fifty-second Conference, held in Helsinki in 1966, also adopted a resolution on international groundwater resources at its Sixty-second Conference, held in Seoul in 1986. There can be no doubt that this supports our proposal that groundwaters be excluded.

2. We propose that artificial canals be excluded, so that canals dug between a watercourse State and another State do not entail the other State becoming a watercourse State.

Article 3. Watercourse agreements

In connection with this article, we refer to article 53 of the Vienna Convention on the Law of Treaties, which states as follows:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purpose of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

We also refer to article 64 of the Convention, which states as follows:

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

In our estimation, the two articles quoted above raise the following questions:

(a) Despite the fact that the draft articles constitute a framework convention, they will nevertheless establish peremptory norms of international law with regard to international watercourses. Are we not therefore entitled to maintain that they will affect existing agreements through the application of articles 53 and 64 of the Vienna Convention on the Law of Treaties, at least in theory?

(b) The framework convention contains provisions that are formulated in non-prescriptive terms. Paragraph 1 of article 3, for example, states that watercourse States may enter into one or more agreements which apply the framework convention. It also contains provisions framed in terms of obligations and provisos. Paragraph 2 of article 3, for example, states that such an agreement shall define the waters to which it applies, and it lays down the proviso that the agreement should not adversely affect, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse. Are provisions of these two types to be treated as merely guidelines for negotiations? In this connection, we should like to point out that the draft articles contain many provisions that are framed in mandatory terms, and we shall refer to those provisions in our observations on the relevant draft articles.

On the basis of the foregoing, we propose that the peremptory norms of international law contained in the framework convention should continue to be regarded as binding.

Article 4. Parties to watercourse agreements

Paragraph 2 of this article states that a watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse is entitled to participate in the negotiation of such an agreement and to become a party thereto. It is to be noted that the paragraph does not address the situation in cases where such an agreement is already in existence at the time the framework convention is adopted.

PART II. GENERAL PRINCIPLES

Article 5. Equitable and reasonable utilization and participation

Paragraph 5 of the commentary on article 5 states that the duty to cooperate and the correlative right to benefit provided for in paragraph 2 of article 5 are not dependent on a specific agreement for their implementation. In our view, this statement confirms that the peremptory norms of international law, including the obligation to cooperate and the right to benefit, are binding on all States without there being any need for their inclusion in a specific agreement. If so, this raises the same two questions as before concerning existing and subsequent agreements that violate such peremptory norms of international law. We consider that, pursuant to articles 53 and 64 of the aforesaid Vienna Convention on the Law of Treaties, such norms should not be violated under any circumstances, whether by existing or subsequent agreements.

Article 6. Factors relevant to equitable and reasonable utilization

1. Paragraph 3 of the commentary on this article states that "Some of the factors listed may be relevant in a particular case while others may not be ...". We do not believe this to be true, since our understanding of article 6, paragraph 1, is that all of the factors and circumstances listed in subparagraphs (a) to (g) are relevant and should be taken into account in addition to other factors and circumstances that are not specified since the list contained in the paragraph is indicative and not exhaustive.

2. Paragraph 3 of the commentary on article 6 also states that some factors and circumstances may be more important and deserve to be accorded greater weight. There is nothing in article 6 that corresponds to this statement, and we therefore propose that it be deleted. We note in this connection that article V, paragraph 2, of the Helsinki Rules deals with the question explicitly and unequivocally when it states that "Relevant factors which are to be considered include, but are not limited to: ...".

3. The Helsinki Rules state that in determining what is an equitable and reasonable share, all relevant factors must be considered together and a conclusion reached on the basis of the whole. We propose that a similar statement should be made in article 6 so as not to leave an opening for claims that some factors are more important than others.

Article 10. Relationship between different kinds of uses

1. Paragraph 1 of this article states that uses that have been accorded priority under an existing agreement or by custom continue to enjoy such priority, but that otherwise no use enjoys inherent priority. Paragraph 2 states that conflict between uses that do not have priority shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs. We propose that the following words be added at the end of the paragraph: "... of those living in the international watercourse basin in question."

2. Since paragraph 1 of article 4 states that every watercourse State is entitled to become a party to any watercourse agreement that applies to the entire international watercourse, it is not proper to impose on a State that will in future become a party to an agreement a priority enshrined in that agreement. Accordingly, we propose that paragraph 1 of article 10 be recast so as to accommodate that fact. It should be reformulated so that a priority is not binding in the case where it is stipulated in a watercourse agreement that applies to an entire international watercourse but where not every watercourse State is a party to the agreement.

3. Since article 6 contains many references to various uses and article 10 addresses the priorities for such uses and conflict between them, it may be appropriate for article 10 either to be incorporated into article 6 or to become article 7.

PART III. PLANNED MEASURES

Article 11. Information concerning planned measures

1. In order to differentiate between the information to be exchanged in accordance with article 9, paragraph 1, and the information to be exchanged in accordance with article 11, we propose that the words "concerning planned measures" be inserted in article 11 after the word "information". This proposal is supported by the fact that it is not conceivable for consultation on the possible effects of planned measures to take place before the information on those measures is available. The very heading of the article and the observations made on it also justify our proposal.

2. It might be useful to add at the end of article 11 a clause stating that the term "measures" includes new projects and programmes, the sense in which it is taken in paragraph 4 of the commentary on the article.

Article 12. Notification concerning planned measures with possible adverse effects

1. Since article 11 provides that information should be exchanged and that consultation should take place on the possible effects of planned measures and since article 12 provides that notification should be given before the implementation of particular measures that may have "a significant adverse effect", it may be appropriate to merge the two articles so that article 12 becomes a proviso in article 11.

2. In order to improve the drafting, we propose that the terms used in the Arabic text for "significant adverse effect" (athar salbi jasim) should be standardized. We find in article 3, paragraph 2, "ta'thir[an] salbi[yan] bi-darajah jasimah" ([does not] adversely affect, to a significant extent, ...), in article 4, paragraph 2, "ta'thir [i.e. yata'aththir] [...] bi-darajah jasimah" (may be affected to a significant extent), and in article 12 "athar salbi jasim" (a significant adverse effect), all referring to the same concept.

3. The use of the term "a significant adverse effect" for the criterion that triggers the procedures provided for in articles 12 to 19 instead of the term "significant harm" is justified in paragraph 2 of the commentary on article 12. It is thus not conceivable that a State should be compelled to give notification that it is planning to cause "significant harm", because such conduct would constitute a violation of the obligation laid down in article 7. Although this justification is acceptable, it nevertheless raises the question of whether the notion that significant adverse effect may not rise to the level of significant harm applies to all the articles in which reference is made to significant adverse effect, such as articles 3 and 4.

4. If, in the Arabic text, the word "al-mutahah" (available) used in article 12 means "al-mutawafirah adatan" (readily available) used in article 9, as is to be understood from paragraph 13 of the commentary on paragraph 9 and from paragraph 5 of the commentary on article 12, we propose that the wording should be standardized so that there is no confusion in understanding what is intended.

Article 13. Period for reply to notification

1. In the Arabic text, the statement made in paragraph 3 of the commentary on article 13 to the effect that the concluding clause (al-jumlah al-ikhtitamiyah) of article 13 reads "unless otherwise agreed" is incorrect and the clause in question comes at the beginning of the article. We therefore propose that the statement be amended.

2. Article 13 (a) does not specify the time with effect from which the six-month period begins. It may be useful to establish this as the date notification is received.

Article 14. Obligations of the notifying State during the period for reply

Our previous observations concerning the standardization of the terms "al-mutawafirah adatan" (readily available) in article 9 and "al-mutahah" (available) in article 12 apply also to this article.

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

Article 23. Protection and preservation of the marine environment

Article 23 raises the question of whether generally accepted international rules and standards are merely to be taken into account, as stated in the article, or are to be binding on States.

Article 24. Management

We note that, in the Arabic text of paragraphs 1, 4 and 5 of the commentary on article 24, the references to article 26 are incorrect and should be to article 24.

Article 25. Regulation

1. We note that, in the Arabic text of paragraphs 1 and 4 of the commentary on article 25, the references to article 27 are incorrect and should be to article 25.

2. We propose the deletion of the words "where appropriate" in paragraph 1 of the article, because cooperation in the areas mentioned in the paragraph is appropriate under all circumstances.

Article 26. Installations

1. We note that, in the Arabic text of paragraphs 1 and 5 of the commentary on article 26, the references to article 28 are incorrect and should be to article 26.

2. The statement in paragraph 2 of the commentary on article 26 to the effect that "there may be circumstances in which it would be appropriate for a watercourse State to participate in the maintenance and protection of works outside its territory as, for example, where it operated the works jointly with the State in which they were situated" is very reasonable and practical, particularly where the resources of the State concerned do not enable it to maintain and protect such works. We propose that a proviso to this effect should be explicitly incorporated into the text of article 26.

PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 27. Prevention and mitigation of harmful conditions

We note that, in the Arabic text of paragraphs 1, 3, 5 and 6 of the commentary on article 27, the references to article 24 are incorrect and should be to article 27.

Article 28. Emergency situations

1. We stress the importance of this article, which requires watercourse States to notify other States potentially affected by any emergency such as floods. It also requires them to notify competent international organizations.

2. We note that, in the Arabic text of paragraph 1 of the commentary on article 28, the reference to article 25 is incorrect and should be to article 28. Likewise, the reference in the same paragraph to article 24 is incorrect and should be to article 27.

PART VI. MISCELLANEOUS PROVISIONS

Article 29. International watercourses and installations in time of armed conflict

To maintain that the framework convention is not binding is inconceivable in the case of this article. It does not lay down any new rule but simply states that international watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules. If the rules of international law referred to are applicable, in existence and binding at the time the framework convention is adopted, then it is inconceivable that they should become non-binding because of their inclusion in the framework convention. There can be no doubt that this is true of all peremptory norms of international law, pursuant to articles 53 and 64 of the Vienna Convention on the Law of Treaties, as we have previously indicated. Article 29 itself makes the same assertion, inasmuch as it stipulates that watercourses shall not be used in violation of those principles and rules. Is it conceivable, in the light of this provision, that it could be maintained that the framework convention is not binding on States in all its aspects and that it merely sets guidelines for the negotiation of international watercourse agreements? In our estimation, it is necessary to establish a classification of the provisions contained in the framework convention so that the applicable peremptory norms of international law are binding on all while other, procedural provisions and provisions on which there is no agreement are non-binding and States can contract out of their application, as we have previously proposed. On the other hand, if the principal function of article 29 "is, in any event, merely to serve as a reminder to States of the applicability of the law of armed conflict to international watercourses", as stated in paragraph 2 of the commentary on the article, we cannot overlook the fact that there are other norms of international law that are binding on States under the terms of other instruments, for example the aforementioned articles 53 and 64 of the Vienna Convention on the Law of Treaties.

As is clear from paragraph 3 of the commentary on article 29, among the rules and principles of international law applicable in the event of armed conflict are the 1907 Hague Convention concerning the Laws and Customs of Land Warfare and article 54 of Protocol I of 1977 Additional to the Geneva Conventions of 12 August 1949, which prohibit the poisoning of water supplies, and article 56 of the same Protocol, which protects dams, dikes and other works from attacks that may cause the release of dangerous forces and consequent severe losses among the civilian population. And there are many more such rules.

Article 30. Indirect procedures

This article shows a concern to require States to discharge their obligations, even in the case where there are conflicts between them, because those obligations serve the interests of all parties. It cannot therefore be maintained that the framework convention is merely a set of model rules for negotiations. At the very least, a classification of its provisions must be

made in order to identify those provisions that are binding and other provisions that may be violated whenever the States concerned see fit.

Article 31. Data and information vital to national defence or security

If it is the intention that every provision of the framework convention should be non-binding, then we do not believe that there is any justification for article 31, which stipulates that nothing in the framework agreement obliges a watercourse State to provide data or information vital to its national defence or security.

Article 32. Non-discrimination

Article 32 is another example that shows that some, at least, of the provisions of the framework convention (non-discrimination in the present case) are binding on States and that they cannot conclude agreements in violation of the framework convention. The reason for this is that non-discrimination is to be considered a peremptory norm of international law that is binding on all States. States may not violate that obligation on the grounds that non-discrimination is stipulated in the framework agreement and has thus become merely part of a set of model rules for negotiations.

Article 33. Settlement of disputes

1. We stress the importance of this article.

2. We propose that subparagraph (b) (vi) be amended to provide that the Commission itself shall determine the State that shall bear the expenses of the Commission or the proportion of the expenses to be borne by each State.

3. We likewise propose the addition of a clause to subparagraph (b) (iii) enabling the Commission to request any State to pay specified amounts to cover the Commission's expenses until such time as a final decision is made on the matter of the party that will bear those expenses in accordance with subparagraph (b) (vi).

4. We propose that the submission of a dispute to arbitration or judicial settlement for which provision is made in paragraph (c) should be made obligatory, since making arbitration or judicial settlement subject to the agreement of the States concerned may cause damage to a wronged State because of the refusal of another State or States to refer the dispute to arbitration or judicial settlement.

RESOLUTION ON CONFINED TRANSBOUNDARY GROUNDWATER

In the fourth preambular paragraph of the resolution, the Commission recognizes the need for continuing efforts to elaborate rules pertaining to confined transboundary groundwater but does not assign the task to a particular body or establish a timetable for its completion. The paragraph is also not reflected in the operative part of the resolution. We therefore propose that a resolution be adopted to address these aspects of the matter.